

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MINNIE MOSELY

PLAINTIFF

vs.

Civil Action No. 2:95cv149-D-A

CHROMCRAFT FURNITURE

DEFENDANT

MEMORANDUM OPINION

Presently before the court is the defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment. Finding the motion well taken, the same shall be granted.

The plaintiff Minnie Mosely brings this action against the defendant Chromcraft Furniture, her former employer, for violations of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. While there are many issues in contention between the parties, it does not appear to be in any substantial dispute that the plaintiff originally filed this action on October 23, 1995, and that the plaintiff did not serve the defendant with process until March 13, 1996.

Fed. R. Civ. P. 4(m) provides:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period . . .

Fed. R. Civ. P. 4(m). The plaintiff in this cause did in fact fail to effect service within the 120 day period, and the defendant seeks dismissal on this ground.

In light of the recent amendments to this rule, if the plaintiff is able to demonstrate "good cause" for his failure to timely serve process, this court is required to grant the plaintiff an extension of time to do so. Rule 4(m) is different from its previous incarnation 4(j) in that 4(m) provides two avenues for the plaintiff to receive additional time to serve process - one mandatory and one permissive:

The plain language of 4(m) . . . broadens the district court's discretion by allowing it to extend the time for service **even when the plaintiff has not shown good cause.** Under Rule 4(m), when a plaintiff fails to serve a defendant within the 120 day period,

the district court "shall dismiss the action with prejudice *or* direct that service be effected within a specified time."

The preliminary inquiry to be made under Rule 4(m) is whether the plaintiff has shown good cause for the failure to timely effect service. In this regard, district courts should continue to follow the cases in this circuit that have guided this inquiry. If good cause is shown, the plaintiff is entitled to a mandatory extension of time. If the plaintiff fails to find good cause, the district court must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service.

Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995) (emphasis added); see also Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1306 (3rd Cir. 1995). The Fifth Circuit has acknowledged the amendment of the rule, but this court is unaware of any controlling Fifth Circuit authority which interprets the provisions of the new Rule 4(m). Henderson v. United States, 51 F.3d 574, 575 n.2 (5th Cir. 1995). In light of the lack of direction from the Fifth Circuit in this matter, the undersigned is in agreement with the analysis of Rule 4(m) given in the Espinoza and Petrucelli decisions.

The only proffered reason for the plaintiff's failure to timely serve process is provided by plaintiff's counsel, who states in an affidavit that:

After the filing of [the plaintiff's] Complaint, process was not actually sought due to the necessity of further investigation of the plaintiff's claims and the retrieval of such supporting documents as could be obtained for purposes of complying with the disclosure requirements of the Civil Justice Reform Act.

This court does not understand why such activity would hinder the service of process, particularly since the complaint had already been filed with the court. The plaintiff served process on the defendant approximately twenty-two (22) days late, and has failed to offer a sufficient explanation to the court for this tardy service.

Therefore, this court finds that the plaintiff has failed to demonstrate "good cause" for failing to serve process upon the defendant within the time period required under Federal Rule of Civil Procedure 4(m), and that she is not entitled to a mandatory extension of time to effect process. Likewise, the court declines to exercise its discretion in this matter to grant the plaintiff a retroactive extension of time to effect process. The plaintiff's claims in this cause shall be dismissed for failure to timely serve process upon the defendant. As the plaintiff's claims are being dismissed on this

ground, the court need not consider the defendant's alternative argument for dismissal.

A separate order in accordance with this opinion shall issue this day.

THIS ____ day of June, 1996.

United States District Judge

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ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the motion of the defendant to dismiss, or in the alternative for summary judgment,
is hereby GRANTED;

2) the plaintiff's claims in this matter are hereby DISMISSED.

SO ORDERED, this the ____ day of June, 1996.

United States District Judge